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No. 05-___

IN THE
Supreme Court of the United States

GARRY IOFFE,
Petitioner,

v.

SKOKIE MOTOR SALES, INC.,
doing business as Sherman Dodge,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32701, *et seq.*, a private party may recover damages from a person who violates the Act or its implementing regulations "with intent to defraud." 49 U.S.C. § 32710(a). The question presented is:

> To state a claim under the Motor Vehicle Information and Cost Savings Act, is it sufficient for a plaintiff to allege that the defendant violated the Act with intent to defraud (as the Eleventh Circuit has held), or must a plaintiff also allege intent to defraud with respect to a vehicle's mileage (as the Seventh Circuit held below)?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 414 F.3d 708, and is reproduced in the Appendix at 1a. The decision of the district court is unreported and is reproduced in the Appendix at 15a.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2005. On September 29, 2005, Justice Stevens granted an extension of the time within which to file this petition to and including December 4, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32710, provides:

> **(a) Violation and amount of damages.**–A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.
>
> **(b) Civil actions.**–A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction . . . .

STATEMENT

Title IV of the Motor Vehicle Information and Cost Savings Act (MVICSA), 49 U.S.C. § 32701, *et seq.*, commonly known as the Odometer Act, establishes a comprehensive regulatory scheme designed to provide consumer confidence in the used auto market by preventing odometer fraud and ensuring the ability of consumers to assess the safety and reliability of motor vehicles. The Act allows an injured consumer to bring a civil action for damages against a person who violates the Act or its implementing regulations "with intent to defraud." 49 U.S.C. § 32710(a).

When petitioner Gary Ioffe purchased a car from respondent Sherman Dodge, Sherman Dodge did not show him the vehicle's title, in violation of MVICSA's implementing regulations. Instead, a Sherman Dodge employee signed Mr. Ioffe's name to the title without his permission. As a result, at the time that he made his purchase, Mr. Ioffe did not know what the title would have revealed—that the vehicle was a rebuilt wreck that was missing an airbag. After he learned the vehicle's true history, Mr. Ioffe filed suit, alleging that Sherman Dodge had violated the Act with the intent to defraud him. In the decision below, the Seventh Circuit held that Mr. Ioffe had not stated a claim under the Act. In rejecting Mr. Ioffe's claim, the court created an additional element that is nowhere to be found in the text of the statute–a requirement that the plaintiff prove intent to defraud *with respect to the vehicle's mileage*. The Eleventh Circuit, in a decision issued just two months later, rejected that approach, concluding that "the Seventh Circuit failed to apply the

statute's plain language." *Owens v. Samkle Automotive Inc.*, 425 F.3d 1318, 1321 n.4 (11th Cir. 2005).

The open disagreement between the Seventh and Eleventh Circuits brings into focus a wider disarray among the lower federal courts and state appellate courts. The split of authority is particularly acute in states such as Illinois and Georgia, where the state and federal courts have arrived at opposite answers to the question presented. Given the need for uniformity in the interstate auto market, the disruption to the national regulatory scheme engendered by the decision below is intolerable and requires this Court's immediate intervention.

A. Statutory and Regulatory Framework

In 1972, Congress enacted the MVICSA to "reduce vehicle operating costs and improve the safety of passenger motor vehicles." S. Rep. No. 92-413 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3960, 3961. Title IV of the MVICSA established "a national policy against odometer tampering." *Id.* In findings accompanying the legislation, Congress concluded that consumers rely heavily on the odometer reading "as an index of the condition and value of the vehicle" and that accurate disclosures are needed to assist buyers "in deciding on the safety and reliability of the vehicle." 49 U.S.C. § 32701(a).

The Act contains not only a flat prohibition on odometer tampering and related activities, *id.* § 32703, but also elaborate standardized disclosure requirements and record-keeping procedures designed

to provide consumers with information about a vehicle's history and to ease the investigation and prosecution of violators. *See id.* § 32705 (establishing disclosure requirements on transfer of motor vehicles); 49 U.S.C. § 32706 (conferring authority on Secretary of Transportation to inspect, investigate, require record-keeping, and conduct civil enforcement proceedings). Enforcement under the Act is carried out chiefly through civil actions by private parties. The Act allows a private party to recover trebled actual damages or $1,500, whichever is greater, from "[a] person who violates [the Act] or a regulation prescribed under [the Act], with intent to defraud." 49 U.S.C. § 32710(a).

In 1986, Congress revisited the problem and concluded that odometer fraud remained "one of the most costly types of fraud in the United States," "cost[ing] consumers in excess of $2 billion annually." S. Rep. 99-47 (1986), at 2, *reprinted in* 1986 U.S.C.C.A.N. 5620, 5621. Despite the 1972 legislation, odometer tampering remained a "very lucrative practice," because "the process [was] very difficult to detect and the risk of getting caught [was] negligible." *Id.* Congress found that the lack of national requirements concerning the issuance and disclosure of vehicle titles played a major role in making it easier for auto wholesalers to commit fraud undetected. *Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. 5620, 5622. In order to prevent these practices and close "loopholes in State titling laws," *id.*, Congress enacted the Truth in Mileage Act, Pub. L. No. 99-579, 100 Stat. 3309 (1986). Among other things, the new legislation mandated that states print titles using secure printing processes and that auto auction companies retain records of used car

sales. *Id.* The statute also increased the civil and criminal penalties for fraud. *Id.*

In 1988, the National Highway Transportation Safety Administration (NHTSA) promulgated regulations implementing the 1986 amendments and emphasizing requirements relating to disclosure of the vehicle's title. To warn future owners about the vehicle's mileage and ownership history and prevent title laundering, the regulations require the seller of a motor vehicle to reveal the mileage to the purchaser "in writing on the title." 49 C.F.R. § 580.5(c). This requirement also "helps create a permanent record or 'paper trail' on the vehicle's title at the place where the vehicle is titled," which "can be checked by car owners and law enforcement and other State officials to track odometer fraud." *Odometer Disclosure Requirements*, 52 Fed. Reg. 27,022, 27,023 (July 17, 1987). Absent the title disclosure requirement, "[t]he integrity of the 'paper trail' intended by Congress would be in jeopardy. This would defeat the purpose of the Act . . . to 'establish certain safegaurds for the protection of purchasers.'" *Id.* at 27025 (quoting 15 U.S.C. § 1981, now codified at 49 U.S.C. § 32701(b)).

B. Factual Background

The facts are undisputed. Pet. App. 16a. On September 12, 2001, respondent Sherman Dodge, a car dealership, purchased a 1993 Toyota Tercel from one of its customers in exchange for a $500 trade-in allowance. *Id.* Sherman Dodge informed the customer that, because the car's title indicated that the car had

been "rebuilt," it would pay no more than $500 for the car. *Id.*

On October 1, 2001, Sherman Dodge sold the same car to Garry Ioffe for $2,637.11. *Id.* At the time of the sale, Sherman Dodge neither informed Mr. Ioffe that the car had been rebuilt nor showed him the car's title. *Id.* Instead, a Sherman Dodge employee signed Mr. Ioffe's name on the back of the title without Mr. Ioffe's knowledge or permission. *See* Plaintiff's Statement of Material Facts ¶ 26-28 (Dist. Ct. Doc. No. 36).

Soon after Mr. Ioffe bought the car, it broke down. *Id.* Mr. Ioffe brought the car to a mechanic, who told him that the car had been rebuilt and could not be repaired. *Id.* When Sherman Dodge refused to accept return of the vehicle, Mr. Ioffe traded it in to another dealership for a $500 credit against the purchase of another vehicle. *Id.*

C. Proceedings Below

1. District Court

Mr. Ioffe brought suit against Sherman Dodge in the United States District Court for the Northern District of Illinois on September 30, 2003, alleging violations of MVICSA and claims under state law. Pet. App. 2a-3a. Jurisdiction was premised on 28 U.S.C. § 1331. He alleged that Sherman Dodge intentionally concealed the fact that the car was a rebuilt wreck and, to effectuate the fraud, intentionally failed to disclose the car's title because it would reveal that the car had been branded "rebuilt." The parties each moved for summary judgment on the MVICSA claim and

Sherman Dodge moved for summary judgment on the state-law claims.

The district court found that the relevant facts were undisputed and concluded that Sherman Dodge had, as a matter of law, "violated Odometer Act regulations" because Sherman Dodge had not disclosed the mileage in writing on the title, as required by 49 C.F.R. § 580.5(c). Moreover, the evidence viewed in a light most favorable to Ioffe showed that Sherman's intent in withholding the title was fraudulent. *Id.* at 17a; *id.* at 3a. The court concluded, however, that Mr. Ioffe had not alleged the requisite "intent to defraud" to state a claim under the Act because the Odometer Act requires the plaintiff to show "intent to defraud with regard to the mileage of the vehicle." *Id.* at 19a. Accordingly, on August 2, 2004, the district court granted respondent's motion for summary judgment on Mr. Ioffe's Odometer Act claim and declined to exercise supplemental jurisdiction over the state-law claims. *Id.* at 22a.

2. Court of Appeals

The Seventh Circuit affirmed. Despite the text of the statute, which provides that "[a] person that violates [MVICSA or its regulations], with intent to defraud, is liable," 49 U.S.C. 32710(a), the court rejected the proposition that "a plaintiff has a private right of action under § 32710 if there has been a violation of the Odometer Act or any of its implementing regulations and the violator intended to defraud the plaintiff." Pet. App. 5a. Instead, the court held that the statute "requires proof that the vehicle

transferor intended to defraud a transferee *with respect to mileage*." *Id.* at 2a (emphasis added).

Although the phrase "with respect to mileage" appears in neither the Act nor its regulations, the court arrived at this result by recasting the text of the statute so that the "intent to defraud" element is construed as a "shorthand designation for specific acts or omissions" that violate the Act or its regulations. *Id.* (quoting *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 562 (1971)). The court thus read the regulation requiring the disclosure of mileage in writing on the vehicle's title, 49 C.F.R. § 580.5(c), as limiting the reach of the statute only to those cases in which the transferor has not made the required disclosure *and* it can be shown that the transferor intended to deceive the transferee as to the vehicle's mileage. The court also suggested that to the extent that NHTSA intended otherwise in adopting its implementing regulations, those regulations exceed NHTSA's authority under the Act. *Id.* at 8a-9a.

Finally, the court concluded that "a requirement that a transferor's fraudulent intent relate to the vehicle's mileage comports with the expressed purposes of the Act and regulations," because the Act is concerned only with preventing odometer fraud. *Id.* at 9a-10a. The court acknowledged Mr. Ioffe's contention that private actions for fraudulent failure to disclose the title to the prospective buyer before sale further the prevention of odometer fraud, but held that the fraudulent intent requirement was intended to foreclose such actions. *Id.* at 10a-11a. Similarly, the court dismissed Mr. Ioffe's argument that "[t]ransferors

that conceal the rebuilt status of cars often do so to defraud transferees as to mileage, and that this can be prevented" by private suits. *Id.* at 11a. "Whether or not this is true," the court held, Congress did not intend to allow such suits. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Courts Are Divided Over the Scope of MVICSA's Private Right of Action.

This case squarely presents an important question of federal statutory interpretation on which the courts are divided. In the decision below, the Seventh Circuit held that to prevail under MVICSA, 49 U.S.C. § 32701, the plaintiff must prove not only that the defendant violated the Act with intent to defraud, but also that the defendant intended to defraud the plaintiff *with respect to the vehicle's mileage.* Pet App. 2a. That holding is directly at odds with the decision issued by the Eleventh Circuit two months later in *Owens v. Samkle Automotive Inc.*, 425 F.3d 1318 (11th Cir. 2005).

In *Owens*, the Eleventh Circuit rejected the Seventh Circuit's reading of the statute on nearly identical facts. The complaint in *Owens* alleged that the defendant, Samkle, had sold the plaintiff a used car without disclosing the car's title "because it sought to conceal what the title would have revealed"—the car's history as a short-term rental vehicle. *Id.* at 1320. Samkle, like the defendant here, argued "that although it may have acted 'with intent to defraud' Ms. Owens when it concealed the title from her, the complaint still fails to state a cause of action because the fraud

referenced in the statute can only relate to the vehicle's mileage." *Id.* at 1321. The Eleventh Circuit, however, found that argument irreconcilable with MVICSA's plain text. *Id.* In the court's view, the statute's meaning was "direct, clear, and unambiguous" and contained no language limiting the meaning of the phrase "intent to defraud." *Id.* The court explicitly criticized the Seventh Circuit's decision in this case for "fail[ing] to apply the statute's plain language." *Id.* at 1321 n.4. The court also explained at length why a plain-language reading is consistent with the Act's purposes, which go beyond prohibiting straightforward odometer tampering to establish a comprehensive regulatory system that seeks to deter sophisticated fraud in the interstate auto market. *Id.* at 1322-25.

The open disagreement between the Seventh and Eleventh Circuits brings into focus a broad, persistent conflict on the question presented among lower federal courts across the country. Federal courts in the Second, Fourth, and Sixth Circuits are in line with the Seventh Circuit in holding that the Act requires a showing of intent to defraud with respect to mileage. Despite the plain language of section 32701, these courts have generally limited the scope of the Act's private right of action based on a narrow understanding of the Act's purpose.[1] By contrast,

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[1] *See, e.g., Locascio v. Imports Unlimited, Inc.*, 309 F. Supp. 2d 267, 270 (D. Conn. 2004) ("It is most in keeping with Congressional intent . . . to read the 'intent to defraud' requirement of the Odometer Act as requiring an intent to defraud with respect to the

courts in the Tenth and Eleventh Circuits have rejected that approach and have adhered to the plain language of the statute.[2]

The split in the federal courts is compounded by confusion in the state courts, which have concurrent

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vehicle's mileage."); *Mayberry v. Ememessay, Inc.*, 201 F. Supp. 2d 687, 695 (W.D. Va. 2002) ("[E]ven if there is a technical violation of the Act, Plaintiff cannot maintain a cause of action without evidence of intent to defraud as it relates to the purposes of the Act . . . . Because Plaintiff concedes that she was not defrauded as to the mileage of the car, her claim under the Odometer Act must fail."); *Compton v. Altavista Motors, Inc.*, 121 F. Supp. 2d 932 (W.D. Va. 2000); *Michael v. Ferris Auto Sales*, 650 F. Supp. 975 (D. Del. 1987); *Hunter v. Riverside Ford Sales, Inc.*, 2005 WL 1529541 (E.D. Mich. 2005).

[2] *See, e.g., Tuckish v. Pompano Motor Co.*, 337 F. Supp. 2d 1313 (S.D. Fla. 2004); *Salmeron v. Highlands Ford Sales, Inc.*, 223 F. Supp. 2d 1238, 1244 (D.N.M. 2002) ("[T]he fact that the actual mileage of a vehicle has been disclosed is not determinative of whether the transferor acted with an intent to defraud. Rather the relevant issue is whether the transferor knew or should have known the law and recklessly disregarded what the law required."), *reconsideration denied*, 248 F. Supp. 2d 1035 (D.N.M. 2003); *Yazzie v. Amigo Chevrolet, Inc.*, 198 F. Supp. 2d 1245 (D.N.M 2001); *cf. Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979).

jurisdiction under MVICSA. Because the Seventh Circuit and the Illinois courts have reached opposite conclusions on the question presented, Mr. Ioffe's case might have proceeded to trial if it had been litigated in state court.[3] Similarly, the outcome of an identical case in Georgia will now turn on whether the case is litigated in the federal courthouse or in the state courthouse just across the street.[4] Such a conflict is intolerable and should not be permitted to continue.

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[3] *Compare Krogull v. Woodfield Chevrolet*, 2004 WL 1429963, at *5 (Ill. Cir. 2004) (plaintiff need *not* show intent to defraud with respect to the vehicle's mileage) *with* Pet. App. 2a (plaintff must show intent to defraud with respect to the vehicle's mileage).

[4] *Compare Preiser v. Jim Letts Oldsmobile, Inc.*, 288 S.E.2d 219 (Ga. Ct. App. 1981) ("We fail to see how an intent to defraud can be inferred solely from a knowing failure to comply with the informational requirements of the Odometer Act"), *and Oden & Sims Used Cars, Inc. v. McMullen*, 264 S.E.2d 580, 582 (Ga. Ct. App. 1980) (holding that plaintiff must prove that "a change in the odometer reading has occurred and that the seller has failed to disclose the change" and expressly rejecting Georgia federal district court decisions to the contrary), *with Owens*, 425 F.3d at 1325 ("[The district court erred when it required Owens to 'allege and prove intent to defraud with respect to a vehicle's mileage.' Owens has alleged violations of the Odometer Act committed with intent to defraud, and is enough to state a claim under § 32710(a).").

Deferring review at this time would only prolong the confusion among the courts.

II. Given the Need for Uniformity in the Interstate Auto Market, the Question Presented Is Exceptionally Important.

When it passed MVICSA in 1972, Congress recognized that only a uniform federal regulatory system could adequately curb fraud in the interstate auto market. Although some states had enacted legislation to address the problem, other states found fraud to be "on the increase, especially when a neighboring State has an odometer law." S. Rep. 92-413 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3960, 3962. The inevitable inconsistency in the states' laws created an incentive for perpetrators of fraud to tamper with vehicles' odometers in states with minimal regulation and then sell those vehicles at inflated prices in states with laws prohibiting fraud. *Id.* As a result, Congress concluded, "State odometer laws are easily circumvented." *Id.* To prevent unscrupulous businesses from taking advantage of the patchwork of state law, Congress sought "to establish a national policy against odometer tampering and prevent consumers from being victimized by such abuses." *Id.*

Similarly, in the 1986 amendments to the Act, Congress added uniform federal requirements to fix the inconsistencies in state requirements concerning the issuance and disclosure of vehicle titles, which were routinely exploited to perpetrate fraud. S. Rep. 99-47, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 5620, 5621; *see* Truth in Mileage Act, Pub. L. No. 99-579, 100 Stat. 3309 (1986). In adopting these amendments, Congress

recognized the special danger of fraud "[a]mong some categories of used cars." S. Rep. 99-47, at 2, *reprinted in* 1986 U.S.C.C.A.N. 5620, 5621 These vehicles, such as leased cars, short-term rental cars, rebuilt wrecks, and flood-damaged vehicles, carry a particularly high risk of fraud because, absent a reliable paper trail, the consumer has no way of learning the vehicle's true history. Sales of rebuilt vehicles, such as the car Mr. Ioffe purchased, are likely to involve fraud because parts of different vehicles with different odometer readings are used in the reconstruction.[5] Similarly, leased or rental cars, like the vehicle in *Owens*, "are attractive targets because they are recent models with higher than average mileage." *Id.* Absent a secure paper trail, fraud involving such vehicles is difficult to detect. *See* Barbara Whitaker, *Safety: Things to Think About If You're Thinking 'Used'*, N.Y. Times, Oct. 26,

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[5]Recognizing this problem, NHTSA has interpreted the Act to require that the mileage associated with the vehicle's chassis be disclosed to the purchaser. *See, e.g.*, NHTSA Opinion Letter, *available at* http://www.nhtsa.dot.gov/cars/rules/interps/aiam/aiam3360.html ("If a vehicle is reconstructed with an older chassis and a new body, then it is the opinion of the National Highway Traffic Safety Administration that the odometer should reflect the mileage traveled by the chassis. Purchasers rely on the odometer as an indication of the safety, reliability, and value of a vehicle. If the mileage which the chassis has been driven is not provided to the purchaser, he could be led into a false sense of security, neglecting needed repairs or inspections.").

2005, at G38 (quoting expert's observation that "The real problem is having someone tell you something is a one-owner, low-mileage cherry, and finding out later it's a rebuilt wreck."). By establishing nationally uniform requirements concerning title issuance and disclosure, MVICSA and its regulations ensure the integrity of the chain of title and make fraud involving such vehicles more difficult. *See Odometer Disclosure Requirements*, 52 Fed. Reg. at 27,023 ("These provisions will provide purchasers and law enforcement investigators with a better means to track a vehicle's course from seller to consumer.").

The conflict among the courts on the question presented disrupts that Congressional interest in uniformity. As a result of the decision below, automobile dealers in the Seventh Circuit are now free to flout federal regulations by withholding the vehicle's title—even when their intent in doing so is to defraud the consumer by concealing what the title would reveal—without having to fear the threat of private actions for civil damages under the Act. Because of the integrated nature of the interstate market for used automobiles and the tendency of violators to seek out jurisdictions with the most lax regulations, the decision is likely to transform the Seventh Circuit into a nationwide magnet for fraud involving violations of MVICSA's regulatory scheme. Indeed, NHTSA has recognized that much of the odometer fraud across the nation stems from particular geographical areas that are known or suspected to be "hotbeds" for such practices. NHTSA, *Incidence of Odometer Fraud* (2002) at 67, *available at* http://www.nhtsa.dot.gov/cars/rules/

regrev/evaluate/pdf/809441.pdf; *see also* Daniel Walsh, *Bridgeton: Home Office of Auto Fraud, Officials Say*, Atlantic City Press, July 31, 2005, at A1 (describing a single warehouse complex in New Jersey that state officials characterize as "a major conduit of car-sale fraud throughout the Northeast," including "title scams, washing salvaged cars, large-scale odometer fraud.").

Although MVICSA authorizes the federal government to investigate violations of the Act and its regulations and bring criminal and civil enforcement actions against violators, the regulatory scheme relies overwhelmingly on civil suits by private parties to ensure compliance. "NHTSA's prime weapon to deter odometer fraud is its power to investigate cases and refer them to the DOJ for prosecution." NHTSA, *Incidence of Odometer Fraud*, *supra*, at 67. Because of limited resources and the difficulty of detecting fraud, however, extremely few cases are actually investigated or prosecuted by the federal government. NHTSA has a staff of only eight employees, including a total of only four investigators, responsible for tracking all Odometer Act violations nationwide. *Id.* at 67. In 2001, the last year for which such statistics are available, NHTSA opened only five investigations, completed only three, and referred only two cases for prosecution to the Justice Department. With respect to prosecutions, there has been even less activity in the last two years for which figures are available. NHTSA prosecuted only one case each year, resulting in the

conviction of one defendant in 2000 and two defendants in 2001. *Id.* at 68.[6]

These low numbers do not reflect a decrease in the incidence of fraud. On the contrary, in 2002 NHTSA conducted an extensive study, which conservatively estimated that there are approximately 452,000 instances of odometer fraud per year in the United States. *Id.* at vi. The study estimates that the cost to consumers, measured by the difference between the inflated prices consumers actually pay and the prices they would have been willing to pay if they had known the vehicle's true mileage, amounts to $2,336 in the average case of fraud, or over $1 billion nationally per year—more than the annual cost of both shoplifting and arson *combined*. *Id.* at viii (citing Department of Justice statistics on crimes against property). That sum, moreover, "does not include inflated financing, insurance and tax costs; additional amounts consumers pay for vehicle repairs; other consequential damages; the decreased resale value due to the vehicles having an altered odometer; or the many indirect and

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[6]In lieu of direct enforcement action, NHTSA's staff attempts to help consumers who have been defrauded to help themselves. Under this program, "consumers are provided with instructions as to what evidence is necessary" to prove their claims, "how to obtain evidence, what action to take to recover their losses, and how to determine the losses." NHTSA, *Incidence of Odometer Fraud*, *supra*, at 72. Unless consumers have the ability to resort to meaningful civil remedies under MVICSA, such assistance is useless.

intangible costs of odometer fraud," including the costs of government programs to deter fraud. *Id.*

Since NHTSA's 2002 study, the incidence of fraud, particularly fraud involving title-related violations, has only increased. *See* James Bernstein, *Odometer Fraud: A crime that's spinning out of control, Feds say mileage is rolled back on 450,000 cars a year*, Newsday, June 7, 2005, at D13 ("Federal officials say odometer fraud is on the rise nationwide . . . [W]hat makes federal investigators' jobs more difficult is that some odometer criminals are experts at 'washing' titles."). The specific type of fraud at issue here—the failure of a dealer to disclose a vehicle's title to conceal the vehicle's damage history—is likely to increase dramatically in the wake of widespread flooding from recent hurricanes, including Hurricane Katrina. *See* Michelle Singletary, *Flood damaged cars wash up in used-car lots*, Miami Herald, Oct. 2, 2005, at E3; Marcia Biederman, *A Used Car or A Katrina Biohazard?*, N.Y. Times, Oct. 17, 2005, at D10 (describing "unprecedented potential for fraud–and peril–in the resale of cars damaged by the storm" and citing estimates that 570,000 cars were damaged by Katrina); Whitaker, *supra* at G38 (noting that "[s]electing safe and reliable used cars will become more challenging as some of the estimated half-million cars damaged in Hurricane Katrina are repaired and resold" and quoting expert predictions that these cars will be bought "at below-market prices and move[d] to places like New York, Washington, Los Angeles, Chicago"). Undoubtedly, many of those flood-damaged cars will make their way to dealers and wholesalers within the Seventh Circuit, who are now free to conceal

the vehicles' histories and sell them to unsuspecting consumers without fear of federal civil liability.

III. The Seventh Circuit Misconstrued the Act.

This Court should also grant certiorari because the Seventh Circuit's decision is wrong. The decisions of the Eleventh Circuit and other courts provide several compelling reasons for this Court to reject the Seventh Circuit's reasoning.

First, and most importantly, the Seventh Circuit's decision departs from the first rule of statutory interpretation: When the language of the statute is plain, there is no need for further inquiry. *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992); *see Owens*, 425 F.3d at 1321 ("To augment the statutory language with an additional element, never mentioned by Congress, that the fraud must be 'with respect to the vehicle's mileage' violates the cardinal rule of statutory construction."). MVICSA provides: "A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater." 49 U.S.C. § 32710(a). This language is unambiguous. Nothing in the statutory text limits the meaning of "intent to defraud" to fraud with respect to a vehicle's mileage. Notably, the Seventh Circuit itself *did not identify any ambiguity* in the language, nor any absurd result that would flow from a plain-language interpretation. Nevertheless, it immediately looked beyond the statutory text and invented an additional requirement—that the plaintiff prove intent to defraud

with respect to mileage—for establishing liability under the Act.

Second, the Seventh Circuit's rewriting of the statute is based on a misapplication of one of this Court's precedents. Relying on *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 562 (1971), the Seventh Circuit construed the Odometer Act's "general statements of prohibited conduct" as a "shorthand designation for the specific acts or omissions" that violate the Act or its regulations, and thus imported into the statute a requirement that fraud be committed only with respect to the vehicle's mileage. Pet. App. 7a-8a. The "sole and narrow question" presented in *International Minerals*, however, was whether knowledge of a regulation that made it a crime for a shipper to "knowingly" violate a regulation concerning the transportation of hazardous materials was a required element of the offense. 402 U.S. 560 ("It is in that narrow zone that the issue of 'mens rea' is raised."). In light of the strong presumption in criminal law that ignorance of the law is no excuse, which served as a backdrop for promulgation of the regulation, the Court held that the regulation should be construed to apply not to the knowledge of the regulation but to knowledge of the facts that gave rise to the violation of the regulation. 402 U.S. at 564-65 ("The Act, so viewed, does not signal exception to the rule that ignorance of the law is no excuse."). Neither the "narrow" *mens rea* issue presented in *International Minerals* nor the criminal law presumption that formed the grounds for the Court's decision are present here. To the contrary, here, no presumption or other canon of statutory

construction warrants abandonment of the statute's plain text.

Third, the Seventh Circuit's decision narrows the scope of MVICSA's private right of action based on an incorrect understanding of the Act's purposes. In the Seventh Circuit's view, Congress intended the Act to permit suit only where fraud is specifically related to a vehicle's mileage because the Act was aimed primarily at preventing fraud with respect to mileage. Pet. App. 11a. As the Eleventh Circuit explained in considerable detail, the text of the statute, its legislative history, and the nature of the regulatory scheme, all undermine that unduly narrow view of the Act's purposes. *Owens*, 425 F.3d at 1322-25.

In enacting the Odometer Act, Congress expressly sought to go beyond mere prohibition of odometer tampering and create comprehensive "safeguards to protect purchasers" and deter odometer fraud. 49 U.S.C. § 32701(b). In its 1986 amendments, Congress went further still. Recognizing that odometer fraud had become an enormous national problem and that "the process is very difficult to detect," Congress sought to "close[ ] the current loopholes in State titling law" to prevent sophisticated types of fraud, including title laundering. S. Rep. 99-47 (1985), at 2-3, reprinted in 1986 U.S.C.C.A.N. 5620, 5621-22. Accordingly, the current regulatory scheme requires that consumers like Mr. Ioffe be permitted to inspect a securely printed title before purchasing a vehicle. 49 C.F.R. §§ 580.4, 580.5. NHTSA's goal in promulgating these regulations, which is consistent with Congressional intent and goes well beyond concerns about the vehicle's mileage alone, was to make it more difficult

for sellers to conceal the vehicle's true history and to establish a "paper trial" for consumers and law enforcement to deter potential violators. *See Odometer Disclosure Requirements*, 52 Fed. Reg. at 27,022-23.

Given the inadequacy of criminal enforcement alone to combat the problems that the statute is designed to address, the ability to bring private suits for fraudulent violations of these important requirements is essential to the success of the overall regulatory scheme. Indeed, Congress provided a civil remedy to punish violations of the Act and its regulations so that the statute would be "largely self-enforcing." H.R. Rep. No. 92-1033, at 20 (1972); *see also Nieto v. Pence*, 578 F.2d 640, 643 (5th Cir. 1978) (recognizing that "unless a violation of the Act can lead to [private] civil liability, the Act is toothless.").

At bottom, what the Seventh Circuit has done is to elevate its own views about what Congress might have or should have intended above the intent that Congress *actually expressed* in the text of the statute. That is a step the courts are forbidden to take. *See Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it"); *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result."). Because the Seventh Circuit's erroneous interpretation has sown confusion among the state and federal courts, upset the uniformity of an important federal regulatory scheme, and created incentives for increased fraud, this Court should grant certiorari to resolve the split and restore

certainty to the interstate auto market for sellers and buyers alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2005

APPENDIX

In the
United States Court of Appeals
for the Seventh Circuit

No. 04-3083

GARRY IOFFE

Plaintiff-Appellant,

v.

SKOKIE MOTOR SALES, INC., doing business as SHERMAN DODGE,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 6892—George W. Lindberg, *Judge.*

ARGUED APRIL 15, 2005–DECIDED JULY 7, 2005

Before FLAUM, Chief Judge, and BAUER and EVANS, *Circuit Judges.*

FLAUM, *Chief Judge.* Plaintiff-appellant Garry Ioffe filed suit regarding a used car he purchased from defendant-appellee Skokie Motor Sales, Inc., doing business as Sherman Dodge, a car dealership. Although Ioffe alleges a violation of 49 C.F.R. § 580.5(c), a regulation promulgated under the federal

Odometer Act, 49 U.S.C. § 32701 *et seq.*, his claim is wholly unrelated to the vehicle's odometer or mileage. For the reasons stated herein, we agree with the district court that an Odometer Act claim that is brought by a private party and is based on a violation of § 580.5(c) requires proof that the vehicle's transferor intended to defraud a transferee with respect to mileage. Accordingly, we affirm the entry of summary judgment in favor of Sherman Dodge.

I. Background

On September 12, 2001, Sherman Dodge purchased a 1993 Toyota Tercel, giving its customer a trade-in allowance of only $500 for the car because its certificate of title stated that it had been "rebuilt." On October 1, 2001, Sherman Dodge sold the same Toyota Tercel to Garry Ioffe for $2,637.11, but did not tell him that the car had been rebuilt or show him the car's title. At the time of sale, Sherman Dodge gave Ioffe an odometer disclosure statement which said that, to the best of Sherman Dodge's knowledge, the Tercel's odometer reading of 90,258 was accurate. Although Sherman Dodge did not give it to Ioffe at the time, the title listed the same mileage. Ioffe does not dispute the accuracy of the disclosed mileage.

Shortly after the purchase, Ioffe started having mechanical problems with the Tercel. He consulted a mechanic and learned for the first time that the car had been rebuilt. When Sherman Dodge refused to remedy the situation to his liking, Ioffe traded in the car at another dealership, receiving $500 for it.

On September 30, 2003, Ioffe filed suit against

Sherman Dodge in federal court, alleging two claims under Illinois law and one claim under the federal Odometer Act. Following cross-motions for summary judgment, the district court granted Sherman Dodge's motion for summary judgment on the Odometer Act claim, denied Ioffe's motion on that claim, and declined to exercise supplemental jurisdiction over Ioffe's state-law claims. In ruling on the federal claim, the court stated that the Odometer Act requires a private plaintiff to prove (1) a violation of the Act or a related regulation, and (2) that the violation was committed with intent to defraud. The evidence viewed in the light most favorable to Ioffe showed that Sherman Dodge had failed to disclose the mileage in writing on the title in violation of 49 C.F.R. § 580.5(c), and that its intent in withholding the title was fraudulent. Nevertheless, the district court held that the Odometer Act claim failed as a matter of law because Sherman Dodge intended to defraud Ioffe with regard to the car's rebuilt status and not its mileage.

Ioffe appeals, arguing that the district court misinterpreted the statute and regulation, and that the "intent to defraud" element of an Odometer Act claim based on a violation of 49 C.F.R. § 580.5(c) may be satisfied by demonstrating fraudulent intent unrelated to a vehicle's mileage.

II. Discussion

Summary judgment is appropriate if the evidence presented by the parties "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We review the district court's

grant of summary judgment de novo, viewing all facts and drawing all reasonable inferences in the non-moving party's favor. *Eiencorp, Inc. v. Rocky Mountain Radar, Inc.*, 398 F.3d 962, 965 (7th Cir.2005).

The question before the Court–whether the Odometer Act creates a private right of action based on a violation of 49 C.F.R. § 580.5(c) where the transferor's fraudulent intent is unrelated to a vehicle's odometer or mileage–comes to us as a matter of first impression. Neither the United States Supreme Court nor any of the federal courts of appeals have addressed it. We begin our inquiry into the proper interpretation of the statute and regulation by determining "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. "Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

The Odometer Act requires the written disclosure of a vehicle's mileage upon transfer and authorizes the Secretary of Transportation to prescribe procedures for doing so:

> Under regulations prescribed by the Secretary of Transportation that include the way in which

> information is disclosed and retained under this section, a person transferring ownership of a motor vehicle shall give the transferee the following written disclosure:
>
> > (A) Disclosure of the cumulative mileage registered on the odometer.
> >
> > (B) Disclosure that the actual mileage is unknown, if the transferor knows that the odometer reading is different from the number of miles the vehicle has actually traveled.

49 U.S.C. § 32705(a)(1). Based upon this delegation of authority, the National Highway Traffic Safety Administration ("NHTSA")[1] promulgated the following regulation: "In connection with the transfer of ownership of a motor vehicle, each transferor shall disclose the mileage to the transferee in writing on the title or . . . on the document being used to reassign the title." 49 C.F.R. § 580.5(c). Finally, the section of the Odometer Act which creates a private right of action provides in relevant part:

> **(a) Violation and amount of damages.**–A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.

---

[1] NHTSA is part of the Department of Transportation and its administrator reports directly to the Secretary of Transportation. See 49 C.F.R. § 1.3(b)(4).

> (b) **Civil actions.**–A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction.

49 U.S.C. § 32710.

Based on these provisions, Ioffe presents the following syllogism: a plaintiff has a private right of action under § 32710 if there has been a violation of the Odometer Act or any of its implementing regulations and the violator intended to defraud the plaintiff; Sherman Dodge violated 49 C.F.R. § 580.5(c), promulgated pursuant to 49 U.S.C. § 32705(a)(1), by disclosing the Tercel's mileage on a document other than its title, and Sherman Dodge intended to defraud Ioffe by hiding the title's "rebuilt" designation; therefore, Ioffe has a claim against Sherman Dodge under the Act. Upon consideration of the language of the statute and the regulation, the specific context in which that language is used, and the broader context of the statute and its implementing regulations, *see Robinson,* 519 U.S. at 341, we conclude that Ioffe's first premise misstates the law. Section 32710 does not create a private right of action for all violations of the Act and regulations that are accompanied by any "intent to defraud." Rather, where a plaintiff alleges a violation of 49 C.F.R. § 580.5(c), he must prove intent to defraud as to a vehicle's mileage. With a correct statement of the law, Ioffe's syllogism, and his claim, fall apart.

The provision of the Odometer Act that provides a private right of action states: "A person that violates this chapter or a regulation prescribed . . . under this

chapter, with intent to defraud, is liable." 49 U.S.C. § 32710(a). The verb "to violate" and its object "this chapter or a regulation" state the prohibited conduct, while the adverbial phrase "with intent to defraud" modifies the prohibited conduct and defines the way in which it must be committed for a private claim to arise. Ioffe first tries to get to his desired interpretation by separating these two aspects of the provision. He contends that we first should ask if there was any violation, and then if there was any contemporaneous intent to defraud. This is not a proper way to read the statute.

When analyzing a prohibited act, we must construe general statements of prohibited conduct (such as "[violation of] this chapter or a regulation") as "shorthand designation[s] for specific acts or omissions which violate the Act [or a regulation]." *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 562 (1971). Because intent requirements modify specific alleged violations, we must replace any shorthand designation for prohibited conduct with a specific violation before interpreting the intent element. *Cf. Int'l Minerals*, 402 U.S. at 561-62. Here, Ioffe alleges a violation of 49 C.F.R. § 580.5(c), which provides in relevant part that each transferor of a motor vehicle "shall disclose the mileage to the transferee in writing on the title." Replacing § 32710(a)'s shorthand designation with the specific conduct prohibited by § 580.5(c), we find that the Act creates the following private right of action: "A person that [does not disclose the mileage to the transferee in writing on the title], with intent to defraud, is liable."

Word choice and sentence structure help clarify how

the "intent to defraud" element operates in this context. The use of "with" in "with intent to defraud" indicates a link between the violative conduct and the intent requirement. The conduct and the fraudulent intent are not two independent elements such that any contemporaneous fraud will do. Rather, there is a prohibited act–not disclosing the mileage to the transferee in writing on the title–which is modified by the adverbial phrase "with intent to defraud." Thus, the private right of action covers prohibited acts that are committed with fraudulent intent and excludes cases where some fraudulent act happens to coincide with a violation of a regulation but the violative act is done for reasons other than to perpetrate a fraud.

Next, Ioffe essentially argues that even if the "intent to defraud" element must be read in connection with the specific violation, the intent requirement does not necessarily apply to the prohibited conduct as a whole. He divides the prohibited act into two parts–"does not disclose the mileage to the transferee" and "in writing on the title"–and argues that § 32710 is satisfied if there is fraudulent intent as to either the transferor's decision not to disclose the mileage or its decision not to provide the title. There is no logical or grammatical reason for this division. The more natural reading is to understand the prohibited conduct as a whole–does not disclose the mileage to the transferee in writing on the title–and to require that the intent to defraud apply to the violation in its entirety. This reading suggests that there must be fraudulent intent as to the decision not to disclose the mileage on the title, not merely as to the decision to withhold the certificate of title for reasons unrelated to the mileage disclosure.

The specific context in which the statutory language appears also supports this reading. Section 32705, the source of NHTSA's authority to promulgate 49 C.F.R. § 580.5(c), requires only that a transferor of a motor vehicle provide written disclosure of "the cumulative mileage registered on the odometer." 49 U.S.C. § 32705(a)(1). In granting authority to issue implementing regulations, Congress directed the Secretary of Transportation to prescribe "the way in which [the cumulative mileage] information is disclosed and retained." *Id.* We have understood this language as "limiting the NHTSA's regulatory authority to the promulgation of mere procedural or logistical rules." *Diersen v. Chi. Car Exch.*, 110 F.3d 481, 485-86 (7th Cir. 1997).

In *Diersen*, a purchaser of a used car brought suit against a dealership, alleging violation of the disclosure requirements of the Odometer Act. The district court granted the dealership's motion for summary judgment based on a regulation which purported to exempt cars ten years old or older from the disclosure requirements of the Act. *Id.* at 484. In reviewing the decision, we observed that the regulation "effectively remove[d] a cause of action that Congress has unambiguously provided to *all* victims of odometer fraud," and we held that to do so was beyond NHTSA's delegated authority to promulgate "mere procedural or logistical rules." *Id.* at 486-87 (emphasis in original).

In enacting the Odometer Act, Congress created a private right to sue a transferor for failure to disclose "the cumulative mileage registered on the odometer," "with intent to defraud." *See* 49 U.S.C. §§ 32705(a)(1)(A); 32710(a). In other words, it created

a private claim for odometer or mileage fraud. If Ioffe is correct about the interaction between § 32710 and 49 C.F.R. § 580.5(c), NHTSA substantively and dramatically changed the law by creating a broad new right of action for all fraud that involves the withholding of a certificate of title. The regulation would do much more than prescribe "the way in which [the cumulative mileage] information is disclosed and retained" by dramatically increasing the number and types of private claims available under the Act and expanding the private right of action far beyond its scope under the statute. There is no indication that Congress intended to authorize NHTSA to effect such a dramatic change in the law or that NHTSA intended to do so.

Finally, looking to the broader context of the statute and its implementing regulations, we see that a requirement that a transferor's fraudulent intent relate to the vehicle's mileage comports with the expressed purposes of the Act and regulations. The only stated purposes of the Act are "(1) to prohibit tampering with motor vehicle odometers; and (2) to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers." 49 U.S.C. § 32701(b). Section 580.5(c) appears in Part 580 of Title 49 of the Code of Federal Regulations, entitled "Odometer Disclosure Requirements," which has the following stated "scope": "This part prescribes rules requiring transferors . . . of motor vehicles to make written disclosure to transferees . . . concerning the odometer mileage and its accuracy as directed by sections [32705(a) and (c)]." 49 C.F.R. § 580.1. The stated purpose of Part 580, in relevant part, is "to provide purchasers of motor vehicles with odometer

information to assist them in determining a vehicle's condition and value by making the disclosure of a vehicle's mileage a condition of title." 49 C.F.R. § 580.2. These statements of purpose and scope indicate that the legislation is concerned specifically with fraud related to a vehicle's mileage rather than with all types of fraud that might involve the withholding of a vehicle's title.

The language and context of the Odometer Act and its implementing regulations support the conclusion that the Act's private right of action based on violations of 49 C.F.R. § 580.5(c) extends only to cases where the transferor intended to defraud a transferee about the vehicle's mileage. Although our inquiry need go no further, *see Robinson*, 519 U.S. at 340, we briefly address Ioffe's additional arguments in favor of a different interpretation of the statute.

First, Ioffe asserts that the Truth in Mileage Act of 1986, which amended 49 U.S.C. §§ 32702, 32705, and 32709, supports his interpretation because it expressly required that the Odometer Act's mandatory disclosures be made on the certificate of title. *See* Pub.L. No. 99-579 (Oct. 28, 1986). In fact, these amendments undermine Ioffe's position. The amendments to § 32702 merely define the terms "auction company," "leased motor vehicle," and "title." *See* 49 U.S.C. §§ 32702(1), (4), (7); Pub.L. No. 99-579, § 2. The amendments to § 32705, governing the "Disclosure Requirements on Transfer of Motor Vehicles," set forth the conditions for licensure by a state of a transferred motor vehicle and create additional information disclosure and retention requirements for leased and auctioned cars. *See*

§§ 32705(b)(1), (b)(3), (c), (d), and (e); Pub.L. No. 99-579, § 2. Although these amendments elevate the importance of the certificate of title in the mileage disclosure process, they do not purport to alter the scope of the private right of action created by § 32710. Instead, through its amendments to § 32709, Congress enhanced the civil and criminal penalties that may be imposed by the federal government, but did not amend the section governing private claims. *See* §§ 32709(a)-(b); Pub.L. No. 99-579, § 3.

These amendments highlight the important distinction between private and public actions which Ioffe ignores. The Odometer Act creates a comprehensive enforcement scheme of which private civil liability is only one part. Public actions may lead to injunctions, civil monetary penalties, and criminal fines and imprisonment. *See* 49 U.S.C. § 32709. While the private right of action based on violations of 49 C.F.R. § 580.5(c) is limited to cases involving fraudulent intent with regard to a vehicle's mileage, other sanctions or remedies may be available for violations of § 580.5(c) that do not involve this type of intent. To promote consistent compliance and to effectuate the purposes of the Act, federal and state governments may strictly enforce the regulations governing the "way in which [the cumulative mileage] information is disclosed and retained," regardless of the violator's intent. *See* 49 U.S.C. § 32705(a)(1). It does not necessarily follow, as Ioffe suggests, that there must also be a private claim for all violations of these procedural regulations. To the contrary, Congress expressly limited the private right of action to the subset of violations that are committed with fraudulent intent.

Next, Ioffe argues that the Tercel's "status as rebuilt provides a direct nexus with its odometer reading." Ioffe describes how rebuilders must face choices in disclosing a vehicle's mileage when parts from different vehicles with different odometer readings are used in the reconstruction. In this case, however, Ioffe does not contend that the mileage disclosed by Sherman Dodge was inaccurate or misleading. Rather, he suggests that transferors that conceal the rebuilt status of cars often do so to defraud transferees as to mileage, and that this can be prevented by recognizing a private right of action for all claims based on this type of fraud. This is essentially the same as Ioffe's final argument that effective prevention of odometer fraud will be furthered by creation of a private right of action for all fraudulent failures to provide the title for inspection before sale. Whether or not this is true, there is no indication in the Act that Congress intended to federalize this multitude of vehicle sales fraud claims that are unrelated to mileage. We may not consider the benefits of what Ioffe believes would be a more effective preventative scheme than the one chosen by Congress.

III. Conclusion

The Odometer Act creates a private right of action for violations of 49 C.F.R. § 580.5(c) only where a transferor chose not to disclose a vehicle's mileage to the transferee in writing on the title with intent to defraud as to the vehicle's mileage. We are not persuaded by Ioffe's arguments that the right extends to situations, as in this case, where the transferor intended to, and did, accurately disclose the vehicle's

mileage. Accordingly, we AFFIRM the district court's grant of summary judgment in favor of Sherman Dodge.

A true Copy:

Teste:

/s/

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED
AUG 03 2004

Garry Ioffe,	)	
	)	
Plaintiff,	)	
	)	No. 03 C 6892
-vs-	)	
	)	JUDGE GEORGE W.
Skokie Motor Sales, Inc.,	)	LINDBERG
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff, Garry Ioffe, has filed a three-count complaint relating to a used car he purchased from defendant, Skokie Motor Sales, Inc. Count I of the complaint alleges that defendant, with intent to defraud, violated the disclosure requirements and related regulations of the federal Motor Vehicle Information and Cost Saving Act, 49 U.S.C. § 32701 *et seq.* ("Odometer Act"); Counts II and III allege state law claims of fraud and breach of implied warranty of merchantability. Defendant has counterclaimed for an offset to any judgment entered in favor of plaintiff. Both parties now move for summary judgment on Count I of the complaint. *See* Fed. R. Civ. P. 56. In addition, defendant moves for summary judgment on Count III, and moves to strike portions of plaintiff's local rule 56.1 statement of material facts. *See* Fed. R.

Civ. P. 12(f); U.S. Dist. Ct., N.D. Ill., R. 56.1.

According to the parties' local rule 56.1 statements of material facts, the undisputed facts of this case are as follows. Defendant is an Illinois-incorporated car dealership; plaintiff is an Illinois resident. On September 12, 2001, defendant purchased a 1993 Toyota Tercel from a customer on trade-in. At the time of trade-in, defendant informed the customer that, because the car's title had a "rebuilt" designation, it would pay no more than $500 for the car.

On October 1, 2001, defendant sold that same Toyota to plaintiff for $2,637.11. Defendant neither told plaintiff the car had been rebuilt nor showed him the car's title at the time of sale. As part of the purchase transaction, defendant asked plaintiff to sign an odometer disclosure statement which indicated the Toyota's odometer reading to be 90,258 miles. Plaintiff does not dispute the accuracy of the disclosed mileage.

Soon after plaintiff bought the Toyota, the car broke down. Plaintiff then brought the car to a mechanic who told him the car had been rebuilt and could not be repaired. When defendant refused to accept return of the vehicle, plaintiff traded it in to another dealership for a credit of $500.

Although defendant does not dispute the above facts, it has moved to strike portions of plaintiff's local rule 56.1 statement. Statements numbers 7 and 8, defendant argues, should be stricken because they state mere legal conclusions. Statement number 7 alleges that Sherman Dodge is a 'dealer' as defined by 49 U.S.C. § 32702(2); it cites the Application for

Vehicle Title and Registration which defendant has signed and numbered in the box requesting dealer's signature and number. Statement number 8 asserts that Sherman Dodge is a 'transferor' as defined by 49 C.F.R. § 580.3; it cites the Odometer Disclosure Statement which defendant has signed in a box marked 'TRANSFEROR'S SIGNATURE.' Statements numbers 7 and 8, therefore, do not merely state legal conclusions; they properly cite to portions of the record in which defendant identifies itself as a 'dealer' and a 'transferor.' Defendant's request to strike Statements numbers 7 and 8 is therefore denied.

Defendant has also moved to strike Statements numbers 11-24, 26-27, and 29-35 because they are irrelevant to plaintiff's Odometer Act claim. Essentially, these statements allege that defendant intentionally defrauded plaintiff as to the rebuilt status of the used car he bought. Because "intent to defraud" is an essential element of plaintiff's cause of action, *see* 49 U.S.C. § 32710(a), these statements are not irrelevant. Defendant's request to strike Statements numbers 11-24, 26-27, and 29-35 is therefore denied.

The parties have filed cross-motions for summary judgment on the Odometer Act violation alleged in Count I of the complaint. Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" within the meaning of Rule 56 if its existence "might affect the outcome of the suit under the governing" substantive law; disputes over such facts are "genuine" if "the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If, therefore, "under the governing law, there can be but one reasonable conclusion as to the verdict," *id.* at 250, this court will grant summary judgment. If, however, "reasonable minds could differ as to the import of the evidence," *id.*, summary judgment will be denied.

Private persons may recover damages under the Odometer Act if the defendant has violated the Act or related regulations "with intent to defraud." 49 U.S.C. § 32710(a). Defendant in this case has violated Odometer Act regulations. Although regulations require that the transferor of a vehicle "disclose the mileage to the transferee in writing on the title, " *see* 49 C.F.R. §580.5(c), defendant disclosed the Toyota's mileage on a separate document, without ever showing plaintiff the title. Because defendant's violation of Odometer Act regulations is undisputed, the only issue is whether defendant acted with requisite "intent to defraud."

The parties in this case disagree as to what kind of "intent to defraud" plaintiff must prove. Plaintiff argues that he only has to prove general intent to defraud with respect to any part of the sale. Accordingly, he alleges that the defendant intentionally defrauded him as to the rebuilt status of the car; defendant did not show him the car's title, he claims, because it did not want him to see the title's "rebuilt" designation. Defendant, however, argues that plaintiff must show intent to defraud with respect to the car's mileage; because plaintiff does not allege that defendant misrepresented the car's mileage, he cannot

recover damages for defendant's violation of the Odometer Act. If defendant's interpretation is correct, plaintiff's Odometer Act claims fails as a matter of law and summary judgment will be awarded to defendant.

The stated purpose of the Odometer Act suggests that defendant's interpretation of the "intent to defraud" requirement is correct. The Act states that its purposes are "(1) to prohibit tampering with motor vehicle odometers; and (2) to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers." 49 U.S.C. § 32701(b)(1),(2). It would be most consistent with these purposes to read "intent to defraud" as intent to defraud with respect to the mileage of the vehicle. This reading ensures a clear connection between the harm suffered by the customer–that is, the purchase of a car with higher mileage than he expected–and the harm prohibited by the Act–that is, the sale of cars with inaccurate odometers. If, instead, the customer had to prove only general intent to defraud as to any aspect of the sale, the car dealer would be liable for damages unrelated to odometer fraud. Because that interpretation would not further the stated purpose of the Odometer Act, "intent to defraud" should be read as an intent to defraud with regard to the mileage of the vehicle.

This reading of the Odometer Act does not, as plaintiff suggests, render it "toothless." Although car dealers are not liable to individual customers unless they intentionally defraud them as to the car's milage, they may be liable, civilly and criminally, to the state and federal governments. *See* 49 U.S.C.§ 32709. The Odometer Act protects the public from odometer fraud

by requiring mileage disclosures to be made "in writing in the title," 49 C.F.R. § 580.5, thus ensuring the integrity of the "paper trail" that can be used by "law enforcement and other State officials to track odometer fraud." 52 Fed. Reg. 27,022 (July 17, 1987). When the dealer violates those disclosure requirements, state and federal government may bring civil lawsuits or criminal charges against him. The Act further protects individual consumers by allowing them to recover damages caused by the dealer's misrepresentations of the car's mileage. When the dealer does not misrepresent the mileage, however, the customer's expectations as to mileage are not affected.

The court's view is consistent with the majority of district courts that have ruled on this issue. In *Ransom v. Rohr-Gurnee Wolkwagon, Inc.*, the defendant violated Odometer Act disclosure requirements in order to defraud the plaintiff as to the make and model of the car she bought. 2001 WL 1241297 (N.D. III. Oct. 12, 2001). The court dismissed the claim because the plaintiff made "no allegation of tampering." *Id.* In *Locascio v. Imports Unlimited, Inc.*, the court held that "[i]t is most in keeping with Congressional intent . . . to read the 'intent to defraud' requirement of the Odometer Act as requiring an intent to defraud *with respect to the vehicle's mileage*." 309 F. Supp. 2d 267,270 (D. Conn. 2004) (emphasis in original). A contrary reading of the Act, the court reasoned, would allow "plaintiffs to bring numerous state law claims in federal court, simply because the state claims concern defects in the automobile's certificate of title." *Id.* At 270-271. In *Michael v. Ferris Auto Sales,* the court granted summary judgment to the defendant, noting that "there is no indication in the legislative

history . . . that Congress intended to address any other problems than actual odometer tampering." 650 F. Supp. 975, 977 (D. De. 1987). In contrast to these cases, two opinions from the District of New Mexico support plaintiff's interpretation of the Odometer Act. In both *Salmeron v. Highland Ford Sales, Inc.* and *Yazzie v. Amigo Chevrolet, Inc.*, the plaintiffs satisfied the "intent to defraud" requirement by showing the defendants' general intent to defraud rather than intent to defraud as to mileage. 223 F. Supp. 2d 1238, 1244 (D.N.M. 2002); 189 F. Supp. 2d 1245, 1248 (D.N.M. 2001). These opinions, however, fail to interpret the "intent to defraud" requirement in light of the Odometer Act's stated purposes and are thus unconvincing to this court. This court, therefore, follows the majority view and holds that private persons must prove intent to defraud as to mileage in order to recover damages under the Odometer Act. *See, e.g., Mayberry v. Ememessay, Inc.*, 201 F. Supp. 2d 687, 694-695 (W.D. Va. 2002); *Purser v. Bill Campbell Porsche Audi, Inc.*, 431 F. Supp. 1235, 1236-37 (N.D. Fla. 1977).

The remaining opinions cited by plaintiff are irrelevant to this case. In *Household Credit Services, Inc. v. Pfennig*, the United States Supreme Court held that, when Congress has explicitly left a gap for the implementing agency to fill, the agency's regulations must be given controlling weight unless manifestly contrary to the statute. 124 S. Ct. 1741, 1747 (2004). In this case, the implementing agency has not issued any regulations concerning the meaning of the phrase "intent to defraud." Furthermore, *Decos v. Jo Jo Motors, Terry v. Whitlock, Ryan v. Edwards*, and *Nieto v. Pence* never address the question of whether general

intent satisfies the requirements of the Act. 2002 U.S. Dist. LEXIS 6873 (N.D. Ill. Apr. 17, 2002); 102 F. Supp. 2d 661 (W.D. Va. 2000); 592 F.2d 756 (4th Cir. 1979); 578 F.2d 640 (5th Cir. 1978). Rather, because all four cases involve inaccurate mileage disclosures, they are consistent with this court's view that private persons must prove intent to defraud as to mileage before recovering damages under the Odometer Act.

Because plaintiff does not allege that defendant defrauded him as to the mileage of the Toyota he bought, he cannot recover damages from defendant under the Odometer Act. Thus, plaintiff's Odometer Act claim fails as a matter of law, and summary judgment on Count I of the complaint is awarded to defendant. Because plaintiff's fraud and breach of implied warranty of merchantability claims cannot "be determined without further trial proceedings and without entanglement with any difficult issues of state law," *Brazinski v. Amoco Petroleum Additives Co.*, 6F. 3d 1176, 1182 (7th Cir. 1993), this court declines to exercise supplemental jurisdiction over them. *See* 28 U.S.C. § 1367(c)(3). Accordingly, counts II and III of the complaint and defendant's counterclaim for offsetting damages are dismissed without prejudice.

ORDERED: Defendant Skokie Motor Sales Motion to Strike [38] is denied. Plaintiff Garry Ioffe's motion for summary judgment [33] is granted in part. Counts II and III of the complaint are dismissed without prejudice. Defendant Skokie Motor Sales' counterclaim is dismissed without prejudice.

ENTER:

/s/

GEORGE W. LINDBERG
Senior U.S. District Judge

8/2/2004

DATE

FILED
JAN 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-735

In The Supreme Court of the United States

GARRY IOFFE,

Petitioner,

v.

SKOKIE MOTOR SALES, INC.,
doing business as Sherman Dodge,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED

Whether the Federal Odometer Act, 49 U.S.C. §§ 32701 *et seq.*, creates a private right of action based on a violation of 49 C.F.R. § 580.5(c) where the transferor's fraudulent intent is unrelated to a vehicle's odometer or mileage?

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STATUTES INVOLVED

Petitioner fails to cite to all of the relevant sections of the Federal Odometer Act and applicable regulations, as required by Supreme Court Rule 14(f). Applicable to this case is Section 32701 of the Act, which sets forth the findings and purposes of the Act. In addition, Section 32705 of the Act and 49 C.F.R. § 580.5(c) set forth the disclosure requirements under the Act.

STATEMENT OF THE CASE

In September of 2003, petitioner, Garry Ioffe ("Ioffe"), filed a lawsuit against respondent, Skokie Motor Sales, Inc. d/b/a Sherman Dodge ("Sherman Dodge") in the United States District Court of the Northern District of Illinois (the "District Court"). (Dist. Ct. Doc. No. 1.) Thereafter, Ioffe filed an amended complaint, alleging three claims: (1) a violation of 49 C.F.R. § 580.5(c), a regulation promulgated under the Federal Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32701 *et seq.* (the "Federal Odometer Act") (Count I); (2) a violation of the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA") (Count II); and (3) breach of the implied warranty of merchantability under the Illinois Uniform Commercial Code, 810 ILCS 5/2-314 (Count III). (Dist. Ct. Doc. No. 28.) The Federal Odometer Act claim was the sole basis for federal jurisdiction.

All of Ioffe's claims arose out of his purchase of a used 1993 Toyota Tercel (the "Toyota") from Sherman Dodge – for which he paid $2,637.11. (Dist. Ct. Doc. No. 28.) At the time of sale, Ioffe was given a separate federal odometer disclosure statement disclosing that the Toyota had 90,258

registered miles. (Dist. Ct. Doc No. 34, para. 3 & Exh. D.) The complaint does not contain any allegation that the odometer on the Toyota was altered or tampered with nor is there any allegation that the odometer reading was in any way incorrect. Rather, the Federal Odometer Act claim is based upon Ioffe's allegation that Sherman Dodge violated the Act by failing to show him the title to the Toyota at the time of sale, the back of which provides for another odometer disclosure. (Dist. Ct. Doc. No. 28, para. 17.) Ioffe then alleges that had the odometer disclosure been made on the back of the title, he would have then seen the front of the title disclosing that the Toyota had been "rebuilt." (Dist. Ct. Doc. No. 28, para. 21.)

The parties filed cross motions for summary judgment on the Federal Odometer Act claim. (Dist. Ct. Doc. Nos. 32 & 33.) The District Court granted Sherman Dodge's motion for summary judgment on the Federal Odometer Act claim, denied Ioffe's summary judgment motion, and dismissed the Federal Odometer Act claim, with prejudice. (Petition, Appendix, p. 22a.) On appeal, the Court of Appeals for the Seventh Circuit affirmed the District Court's ruling. (Petition, Appendix, p. 2a) Ioffe has now filed the instant petition for writ of certiorari before the Supreme Court of the United States.

REASONS FOR DENYING THE PETITION

It is axiomatic that the review of a case before the Supreme Court of the United States is reserved for matters that are of the utmost importance, mature enough for consideration and ones that demand immediate attention. At present, only two United States circuit courts have

addressed the issue raised by Ioffe. Ultimately, other circuit courts will likely weigh in (many district courts in other circuits have addressed the issue – *see* discussion below), which may, in turn, create a majority position that all circuits might eventually follow. Accordingly, there may never be a need for this Court to review the issue presented by Ioffe.

In addition, Ioffe has not and cannot contend that he is unable to obtain adequate relief for the alleged wrongful conduct and, therefore, there is no urgency in hearing the appeal. It is undisputed that Ioffe is currently pursuing state law claims in Illinois on the same facts alleged in support of his odometer claim. The relief available to Ioffe under his state law theories is even greater than that available under the Federal Odometer Act. Accordingly, the matter is not mature enough for review by the Court, and there is not a compelling need to decide the issue.

I. The Issue Is Not Yet Mature For Consideration.

Although there is a disagreement between the Seventh and Eleventh Circuits, the issue has not percolated among the other circuit courts so as to create a real need for this Court to review the matter. While certain district courts in the Second, Third, Fourth, Sixth and Tenth Circuit have ruled upon this issue, the circuit courts in these districts have not yet been presented with the issue. Moreover, no district or circuit courts in the First, Fifth, Eighth, and Ninth Circuits have yet to consider the issue. To further define and shape the issue, other federal courts should first be presented with and rule upon the issue to determine whether a review by this Court will even be necessary. A majority position may emerge, which, in turn,

could sway either the Seventh Circuit or Eleventh Circuit to change their position.

Of the district courts that have ruled on this issue, the majority of the courts have sided with the Seventh Circuit's approach. *Hunter v. Riverside Ford Sales, Inc.*, Case No. 04-CV-71222, 2005 WL 1529541, at *2-5 (E.D. Mich. June 23, 2005); *Locascio v. Imports Unlimited, Inc.*, Case No. CIV.A. 3:02CV299(SRU), 2004 WL 546853, at *3 (D.Conn. Mar. 12, 2004); *Mayberry v. Ememessay, Inc. d/b/a Lake Ridge Suzuki*, 201 F.Supp.2d 687, 695 (W.D. Va. 2002); *Tripp v. Charlie Falk Auto*, Case No. CIV. 3:00CV512, 2001 WL 1105132, at *4 (E.D. Va. Aug. 22, 2001); *Comptom v. Altavista Motors, Inc.*, 121 F.Supp.2d 932, 941-42 (W.D. Va. 2000); *Michael v. Ferris Auto Sales*, 650 F.Supp. 975, 977 (D. De. 1987).

In contrast, it appears that only one district court (the District Court of New Mexico) follows the Eleventh Circuit view (i.e., that only a general intent to defraud is required under Section 580.5(c) to pursue a claim under the Federal Odometer Act). Federal courts, including the Northern District of Illinois in its earlier decision in this case, have criticized this view because it fails to interpret the "intent to defraud" requirement in light of the Federal Odometer Act's stated purposes. (Petition, Appendix at 15a.) *See also, e.g, Hamilton v. O'Connor Chevrolet, Inc.*, Case No. 02 C 1897, 2004 WL 1403711, at *10 n.8 (N.D. Ill. June 23, 2004) (citations omitted); *Locascio*, 309 F.Supp.2d at 270; *Mayberry*, 101 F.Supp.2d at 695 n.1.

In an attempt to craft his petition to suggest there is a more definite split among the federal courts, Ioffe misstates the case law arguing that the following decisions support the Eleventh Circuit's view: *Tuckish v. Pompano*

Motor Co., 337 F.Supp. 1313 (S.D. Fla. 2004), and *Leslie v. George Thompson Ford, Inc.*, 484 F.Supp. 954 (N.D. Ga. 1979). In *Tuckish*, although the court considered the majority and minority views regarding the intent requirement under Section 32710(a), the court held:

> [The plaintiff] does allege intent to defraud in his amended complaint, when he states that when Canadian cars are imported, the odometers must be converted from kilometers to miles, *which creates an opportunity to tamper with the odometer reading and shave thousands of miles, thus increasing the market value of the vehicle. . . .* Therefore, [the plaintiff] alleges the violation of the Odometer Act with the required intent to defraud. Accordingly, [the plaintiff] stated a cause of action under the Odometer Act and the motion to dismiss is denied as to Count I.

Id. at 1319 (emphasis supplied). Therefore, the court in *Tuckish* clearly found allegations suggesting possible odometer tampering and, therefore, an intent to defraud with respect to the mileage. The *Tuckish* decision nowhere suggests that a general intent to defraud is sufficient to state a claim under the Act.

As for the *Leslie* decision, while the court, in *dicta*, made a statement regarding non-mileage violations, it did not specifically addressed the issue of intent under Section 32710(a) and, ultimately, held that there was no liability under the Act and granted summary judgment in favor of the dealer. *Id.* at 957. *See also Comptom*, 121 F.Supp.2d at 942 ("*Leslie* is far from a clear endorsement of [the plaintiff's] theory that a consumer plaintiff can establish the requisite intent to defraud under the Act by pointing to

actual or constructive knowledge of violations unrelated to accurate mileage disclosure.").

Accordingly, the trend of the district courts that have been presented with this issue is consistent with the Seventh Circuit's approach limiting the Federal Odometer Act to a private cause of action involving mileage fraud. *Hunter*, 2005 WL 1529541, at *2-5; *Hamilton*, 2004 WL 1403711, at *10 n.8; *Locascio*, 2004 WL 546853, at *3; *Mayberry*, 201 F.Supp.2d at 695; *Tripp*, 2001 WL 1105132, at *4; *Ransom v. Rohr-Gurnee Volkswagen, Inc.*, Case No. 01 C 2137, 2001 WL 1241297, at *2 (N.D. Ill. Oct. 15, 2001); *Comptom*, 121 F.Supp.2d at 941-42; *Team Food Service, Inc. v. Francis Cadillac, Inc.*, Case No. 88 C 1793, 1988 WL 74730, at *2 (N.D. Ill. July 11, 1988); *Michael*, 650 F.Supp. at 977.

In short, it would be beneficial to allow other circuit courts to rule upon the issue to see whether review by this Court is even necessary. Indeed, if the federal courts continue to side with the Seventh Circuit's approach, the issue may never percolate, and the Eleventh Circuit may reconsider its position. At the very least, however, this Court would benefit from additional analysis from other circuit courts.

II. There Is No Pressing Need To Grant The Petition For Writ.

The disagreement between the Seventh Circuit and the Eleventh Circuit over the extension of the Federal Odometer Act to fraud claims other than those involving odometers, i.e., mileage fraud (the Seventh Circuit saying the Act is limited to mileage fraud, the Eleventh Circuit saying the Act can include other fraud claims) does not

effect the ability of consumers to seek relief in court for non-mileage fraud. State law claims, such as common law fraud and consumer fraud, can be pursued on the same facts, as highlighted in this very case in which Ioffe has filed a state action seeking essentially the same damages. Indeed, Ioffe fails to acknowledge that he is currently pursuing several claims against Sherman Dodge in the Circuit Court of Cook County, *Ioffe v. Skokie Motor Sales, Inc. d/b/a Sherman Dodge*, Case No. 04 L 009944, based upon the very same allegations that make up his Federal Odometer Act claim. In particular, Ioffe is pursuing a claim under the Illinois Consumer Fraud Act, 815 ILCS 505/2, which allows a consumer to seek actual damages, punitive damages, and attorney fees.

In reality, Ioffe is merely forum shopping, with the federal court as his preferred venue. But there is no harm to the public, as suggested by Ioffe, if the matter is not reviewed by this Court, as the state courts can and do accommodate the claims. Ioffe further argues that as a result of the decision below, "automobile dealers in the Seventh Circuit are now free to flout federal regulations by withholding the vehicle's title – even when their intent in doing so is to defraud the consumer by concealing what the title would reveal – without having to fear the threat of private actions for civil damages under the Act." (Petition, p. 15.) Not true. Although Ioffe is correct that a consumer in Illinois could not use the Federal Odometer Act to sue an automobile dealer for non-mileage claims, Ioffe is mistaken to the extent he suggests consumers would have no legal recourse for the alleged fraudulent titling practices. His complaint in Illinois state court is proof of that.

Moreover, Ioffe's suggestion that review of this issue is essential because the purpose of the Federal Odometer Act

would be thwarted if automobile dealers cannot be held civilly liable for technical violations of the Act that have nothing to do with odometer tampering or mileage discrepancy is without merit. The purposes of the Federal Odometer Act (which Ioffe fails to even cite) are expressly stated in Section 32701 of the Act:

> (1) to prohibit tampering with motor vehicle odometers; and
>
> (2) to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers.

49 U.S.C. § 32701(b). The Federal Odometer Act advances the stated purposes by requiring the accurate disclosure of mileage, which is the very purpose of the "Odometer" Act. Every state continues to be subject to the Federal Odometer Act protecting citizens against odometer fraud. In addition, every state, including Illinois where Ioffe purchased the subject vehicle, has an odometer statute that likewise requires the accurate disclosure of mileage.

Thus, contrary to Ioffe's suggestion, the Seventh Circuit's ruling does not disrupt the advancement of the Act's goals; rather, the Seventh Circuit merely held that a private cause of action under the Federal Odometer Act can only be pursued when a consumer's claim involves an allegation of odometer fraud. This makes perfect sense because if a customer could pursue claims that have nothing to do with the mileage of the vehicle under the guise of the Federal Odometer Act, numerous state law claims would be filed in federal court "'simply because the state claims concern a defect in the automobile's certificate of title.'" (Petition, Appendix, p. 20a (quoting *Locascio*, 309 F.Supp.2d at 270); *see also, e.g.*, *Comptom*, 121 F.Supp.2d

at 941-42 ("To interpret the 'intent to defraud' provision as . . . plaintiff [does] could lead to the federalization of a 'large segment of common law fraud,' which is certainly not consistent with the stated purposes of the Odometer Act.").

Therefore, because Ioffe may pursue (and currently is pursuing) essentially the same type of claim under state law theories in which he is entitled to even greater relief, Ioffe is mistaken to the extent he suggests he, or others, will be harmed if this Court denies his petition.

CONCLUSION

For the reasons stated, this Court should deny Ioffe's petition for writ of certiorari.

Respectfully submitted,

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Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY

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PETITIONER'S REPLY

Respondent Sherman Dodge urges the Court to deny review for two basic reasons. First, although Sherman Dodge acknowledges a direct conflict between the Seventh and Eleventh Circuits on the question presented, it maintains that the Court should not resolve the conflict because, after other circuits weigh in, the conflict may resolve itself without a decision from this Court. Second, Sherman Dodge maintains that because consumers who have suffered the same or similar harms as those alleged by Mr. Ioffe can pursue claims under *state* consumer protection laws, this Court need not consider the direct conflict that has developed under *federal* law. Both arguments are premised on a misunderstanding of the relevant circumstances and neither provides a reason to deny review.

A. The Circuit Conflict Should Be Resolved Now.

Sherman Dodge does not deny that the Eleventh and Seventh Circuits are in direct conflict on the question presented and that if Mr. Ioffe's case had been filed in a district court within the Eleventh Circuit, his complaint would have stated a claim for damages for violation of the title-disclosure requirements of 49 C.F.R. § 580.5(c). In support of its assertion that the Court should decline to resolve the conflict, Sherman Dodge speculates that the Eleventh Circuit may reject its recent plain-language holding on the meaning of "intent to defraud" under 49 U.S.C. § 32710(a), *see Owens v. Samkle Auto. Inc.*, 425 F.3d 1318 (11th Cir. 2005), and adopt the Seventh Circuit's view that § 32710(a)'s text silently includes a requirement that the seller's deception concern the vehicle's mileage. There is no basis for such speculation.

The precedent established by the unanimous panel decision in *Owens* may only be overruled by the

Eleventh Circuit sitting en banc. *See, e.g., United States v. Petho*, 409 F.3d 1277, 1280 (11th Cir. 2005). En banc review is very rare in the Eleventh Circuit, as it is nationally.[1] Nor can it be said that en banc review is relatively more likely here because the Eleventh Circuit in *Owens* did not fully consider the arguments that were accepted by the Seventh Circuit below. To the contrary, *Owens* carefully reviewed both the textual and policy justifications for the decision below and rejected them as at odds with the plain language of 49 U.S.C. § 32710(a) and the purposes of the Motor Vehicle Information and Cost Savings Act (MVICSA or the Act). *Owens*, 425 F.3d at 1321 & n.4, 1322-25; *see* Petition 9-10, 13-15.

Similarly, because of the directness of the circuit conflict and the Seventh and Eleventh Circuits' full airing of the issues, Sherman Dodge is wrong to suggest that this Court should not consider the question presented until other circuits have added to the confusion. Moreover, as explained in the petition (at 15-16), the circuit split in this case has national impact because of the mobility of vehicles and, thus, the likelihood that used vehicles in the hands of resellers will migrate to jurisdictions in which federal law is more favorable to dealers. Sherman Dodge does not deny this reality or respond to the specific evidence

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[1] *See* Administrative Office of the U.S. Courts, "Judicial Business of the United States Courts 2004," Supplemental Table S-1, *available at* http://www.uscourts.gov/judbus2004/tables/s1.pdf (of 3,104 Eleventh Circuit appeals terminated on the merits in fiscal year 2004, including 656 after oral argument, only four were resolved en banc; of 27,438 appeals resolved on the merits nationally, 51 were resolved en banc after oral argument and eight without oral argument); *see generally* Richard S. Arnold, "Why Judges Don't Like Petitions for Rehearing," 3 J. App. Prac. & Process 29 (Spring 2001).

cited in the petition in this regard. Indeed, since the filing of the petition, a new spate of reports have described the continuing problem of vehicles whose damage is hidden through circumvention of title-disclosure requirements migrating to urban centers where they are resold to unsuspecting consumers.[2] One recent report specifically focused on the problem that damaged vehicles, such as the thousands damaged in hurricanes Katrina and Rita, are moving to states with "looser titling laws."[3] Similarly, as explained in the petition (at 18-19), damaged vehicles will tend to migrate to the states of the Seventh Circuit, where the ability of injured consumers to enforce the title-disclosure requirements of 49 C.F.R. § 580.5(c) has been seriously undermined.

In sum, Sherman Dodge presents no plausible basis for believing that the circuit conflict will be resolved without this Court's intervention, and no reason for this Court to await developments in other circuits. The conflict should be resolved now.

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[2] *See, e.g.*, Steve Rubenstein, "Warning given on used cars damaged in hurricanes," San Francisco Chronicle, Jan. 27, 2006, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/27/BAG8AGUGML1.DTL; Mike Hanley, "Avoid buying flood-damaged, title washed cars," Duluth Times, Jan. 28, 2006, *available at* http://www.duluthsuperior.com/mld/duluthsuperior/news/local/13723721.htm.

[3] Jeff Brady, National Public Radio, "Holes in Monitoring System Let Lemons Get Resold," Jan. 31, 2006, *available at* http://www.npr.org/templates/story/story.php?storyId=5173717.

B. The Supposed Availability Of Equivalent State-Law Remedies Is Not A Basis For Denying Review.

Sherman Dodge claims that the question presented is unimportant because of the availability of state-law "non-mileage" consumer remedies that are equivalent to the remedies that Mr. Ioffe maintains are available under federal law. Br. for Resp. 7-8. Fundamentally, Sherman Dodge is wrong because this Court has never even suggested, let alone held, that the availability of state-law remedies provides a basis for ignoring a federal right of action expressly provided by Congress. Here, in enacting and amending MVICSA in 1972 and 1986, respectively, Congress stated that one of its purposes in adopting a uniform federal law was to avoid actual or potential inconsistencies and gaps in state law. *See* Petition 13.

In any event, Sherman Dodge's argument is wrong even on its own terms. That is, even assuming that this Court should decline to resolve a conflict over the meaning of federal law when equivalent remedies are available under state law, the state-law remedies here are not, in fact, equivalent. MVICSA's private right of action provides that a person who violates the Act or a regulation promulgated thereunder, with intent to defraud, is liable for treble actual damages or $1,500 per violation, whichever is greater. 49 U.S.C. § 32710(a). Moreover, the court "shall" award costs and "a reasonable attorney's fee" to a prevailing plaintiff. *Id.* § 32710(b). This unusual automatic fee-shifting statute in favor of prevailing plaintiffs (but not prevailing defendants) underscores the importance Congress accorded to private enforcement under the Act.

As for state law, despite Sherman Dodge's unsupported assertion to the contrary, Sherman Dodge has not shown that the kind of conduct at issue here would give rise to liability under generic state consumer protection statutes. Moreover, the remedies available under such state statutes are far from uniformly equivalent to the specific federal remedies under MVICSA. Many states' consumer protection statutes provide only actual damages, not trebled or otherwise enhanced damages.[4] Many states, including petitioner Ioffe's state, Illinois, *see* Ill. Comp. Stat. § 505/10a, do not provide presumed statutory damages, let alone the automatic $1,500 minimum under federal law.[5] And, finally, most states provide only a discretionary award of attorney's fees to the prevailing

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[4]Only about half the states' general consumer protection statutes authorize treble or other multiple damage awards at all. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 756 (6th ed. 2004); *see, e.g.*, Ark. Code Ann. § 4-88-113(f) (no multiple damages); Conn. Gen. Stat. Ann. § 42-110g(a) (same); Fla. Stat. Ann. § 501.211 (same); Me. Rev. Stat. Ann., tit. 5, § 213(1). Even among states that authorize multiple damages, the conditions under which they may be awarded vary greatly. *See* National Consumer Law Center, *supra*, at 758-61; *see, e.g.*, Colo. Rev. § 6-1-113(2)(a)(III) (no treble damages unless shown by clear and convincing evidence that defendant acted in bad faith); La. Rev. Stat. Ann. § 51:1409(A) (no treble damages unless violation is knowing and is committed after notice given by Attorney General).

[5]Only about half the states' consumer protection laws authorize presumed minimum damages at all, National Consumer Law Center, *supra* note 4, at 754, and among those that do, some are far less generous than MVICSA. *See, e.g.*, Ala. Code § 8-19-10(a)(1) ($100 minimum damages); Mass. Gen. Laws Ann. ch. 93A, § 9(3) ($25 minimum damages).

party, not a mandatory fee, as under MVICSA.[6] In sum, the law of the states often falls well below the uniform national remedial standard set by MVICSA.

In making its state-law equivalency argument, Sherman Dodge also errs in characterizing Mr. Ioffe's position as one that would "federalize" ordinary state common-law fraud. *See* Resp. Br. 8-9. To prevail on a MVICSA claim, the plaintiff must prove a violation of the Act or one of its regulations. 49 U.S.C. § 32710(a). That is, the plaintiff must prove a violation of *federal* law. In this case, Mr. Ioffe alleged a violation of 49 C.F.R. § 580.5(c). It is undisputed that the Attorney General may bring an action to enjoin any violation of the Act and its regulations, including section 580.5(c), and to collect substantial civil penalties for such a violation. *See* 49 U.S.C. § 32709 (a), (c). Because such actions are premised on violations of federal law, they do not "federalize" state law any more than do private damages actions under 49 U.S.C. § 32710(a).[7]

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[6] *See, e.g.,* Ind. Code Ann. § 24-5-0.5-4(a) (court "may" award fees to prevailing party); Md. Code Ann. Com. Law § 13-408(b) (same); Mo. Rev. Stat. § 407.025(1) (same); *see also, e.g.*, Del. Code Ann., tit. 6, § 2533(b) (fee award only in exceptional circumstances and where defendant's underlying violation was willful); N.C. Gen. Stat. Ann. § 75-16.1(1) (fee award only where defendant's conduct was willful and defendant engaged in unwarranted refusal to settle).

[7] Sherman Dodge also mischaracterizes the question presented when it accuses Mr. Ioffe of "forum shopping" by seeking to vindicate his federal claims in federal court. Br. for Resp. 7. Congress gave federal and state courts concurrent jurisdiction to hear MVICSA claims. 49 U.S.C. § 32710(b). Thus, Mr. Ioffe has done nothing wrong by seeking to vindicate his federal claim in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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